

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE

CARL WHITAKER, )  
Plaintiff, )  
v. )  
THE DOLLYWOOD COMPANY, )  
Defendant. )  
No. 3:08-CV-71  
(Phillips)

## ORDER

In this lawsuit, plaintiff Carl Whitaker claims that the defendant Dollywood Company discriminated against him because of his Native American heritage and that after he reported the discrimination, his work hours were reduced, he was denied an evaluation and denied a raise in pay, in violation of state and federal law. Currently pending is the motion for summary judgment of defendant Dollywood Company.

Upon careful review of the record, the court finds that there are multiple issues of material fact which remain to be determined including: (1) whether plaintiff was subjected to a hostile work environment on the basis of his Native American heritage; (2) whether defendant took adequate measures to investigate and remedy the harassment; (3) whether defendant retaliated against plaintiff for making a complaint of harassment; and (4) whether defendant's actions resulted in a constructive discharge of plaintiff.

Accordingly, defendant Dollywood Company's motion for summary judgment [Doc. 20] is hereby **DENIED**.

In addition, the following action is taken:

Defendant Dollywood Company has moved to strike plaintiff's affidavit filed in response to its motion for summary judgment. The court agrees that plaintiff's affidavit, filed after his deposition, directly contradicts his deposition testimony and "constitutes an attempt to create a sham fact issue." See *Areal, S.R.L. v. PCC Airfoils, LLC*, 448 F.3d 899, 908 (6<sup>th</sup> Cir. 2006). Accordingly, defendant's motion to strike [Doc. 28] is **GRANTED**. The court has not considered the affidavit in deciding the pending motion for summary judgment.

Plaintiff has moved to strike defendant's reply to his response to the motion for summary judgment as untimely. In response, defendant has moved for leave to file its reply out of time, which motion is **GRANTED**. Accordingly, plaintiff's motion to strike [Doc. 29] is **DENIED AS MOOT**.

Last, plaintiff has moved to strike defendant's statement of material facts as untimely. As defendant's late-filed statement of facts merely reiterates the facts contained in its memorandum in support of the motion for summary judgment, striking the statement

of material facts would serve no purpose. Accordingly, plaintiff's motion to strike [Doc. 32] is **DENIED AS MOOT.**

**IT IS SO ORDERED.**

**ENTER:**

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s/ Thomas W. Phillips  
United States District Judge